they had a lien which I have sustained as a maritime lien, and prior. But the other material men have no lien; and therefore no remedy *in rem.* Of course, they cannot have an equity against the proceeds of sale, except as against the owner. Their admission here to be paid from the surplus, is a doctrine at first slowly received; and concerning the true source of which there is not even now the certainty that we might expect and desire. Their claim upon the surplus is worked out through the debtor; and their equity as against him, in the proceeds of a sale, is admitted. But that cannot be compared with the claim of a mortgagee, which existed as a lien affecting the vessel itself, was divested by the action of the court, and postponed to another lien; but which by the plainest principles of equity survives against the proceeds, or the surplus which remains, to the exclusion of all others who are but general creditors.

I have no hesitation in holding, that after the payment to James Marsh & Son, John Commins is entitled to be paid the amount due him under his mortgage. The balance then remaining will be divided ratably between Bee & Tylee and Henry Smyzer. The decree will be so entered.

In the Supreme Court of Pennsylvania, 1858.

EUGENE SULLIVAN *vs.* THE PHILADELPHIA AND READING RAILROAD.

1. The carrier's contract with his passenger implies: first, that the latter shall obey the former's reasonable regulations; second, that the carrier shall have his means of transportation complete and in order, and his servants competent.
2. If a passenger be hurt without his own fault, this fact raises a presumption of negligence, and casts the *onus* on the carrier.
3. This being a presumption of fact, it is for the jury to determine.
4. Erie Railroad vs. Skinner, 7 Harr. 298; 1 Am. Law Reg. 97, explained.
5. It is no answer to an action by a passenger against the carrier, that the injury was caused by the negligence, or even trespass, of a third person. The parties are bound by their contract.

This case came up on a writ of error to the Common Pleas of Chester county.

The opinion of the court, in which the facts appear, was delivered by WOODWARD, J.—When a railroad company undertakes the trans-

portation of a passenger for an agreed price, the contract includes many things. On the part of the passenger, his consent is implied to all the company's reasonable rules and regulations, for entering, occupying and leaving their cars; and if injury befall him by reason of his disregard of regulations which are necessary to the conduct of the business, the company are not liable in damages, even though the negligence of their servants concurred with his own negligence in causing the mischief.

On the part of the company, the contract implies that they are provided with a safe and sufficient railroad to the point indicated; that their cars are staunch, and roadworthy; that means have been taken beforehand to guard against every apparent danger that may beset the passenger; and that the servants in charge are tried, sober, competent men. When, in performing this contract, they hurt a passenger without fault of his, the law raises prima facie a presumption of negligence, and throws on the company the onus of showing it did not exist. This may be shown, and the legal presumption repelled, by proving that the injury resulted from inevitable accident, or, as it is commonly called, the act of God, or that it was caused by something against which no human foresight and prudence could provide. What these can do for the safety of the passenger, the law requires the transportating company to do.

But as presumptions of law are always for the court to pronounce, so are the repelling circumstances relied on, for the jury. The legal presumption, which is only an inference from general experience, remains of force until a countervailing presumption of facts is established; and as this is a conclusion drawn from particular circumstances, it is for the jury to consider these circumstances, and to determine what is the reasonable deduction.

Yet the court below not only failed to presume negligence from the fact of the injury, but instructed the jury that if they believed the testimony in the cause, there was no negligence on the part of the defendant or its agents.

Again, even more pointedly, the learned judge said, "no proof of negligence has been exhibited against the agents and engineer, which would authorize me to submit it to the consideration of the

jury." This was withdrawing from the jury a case that ought to have been submitted, with very different instructions. The plaintiff was in no fault; he had taken his seat within the car, and in all respects he had demeaned himself as an orderly passenger. Yet he was injured by the overthrow of the car in which he was seated.

Here was a breach of the company's contract, and here was what has several times been said by this court to be evidence of the company's neglect; 8 Barr, 483, 12 Harris, 469. Then, if the court thought there was evidence which was calculated to repel this prima facie presumption of negligence, they should have submitted it to the jury.

Whether that spot in the road was not so commonly infested with cows as to require a fence or cattle guard of some sort; whether the speed of the cars was not too great for a curve, exposed at all times to the incursions of cattle; whether the engineer discovered the cow as soon as he might, and used his best endeavors to avert the collision—in a word, whether the accident was such as no foresight on the part of the company or its servants could have prevented; these were questions, and grave ones, too, that ought to have been submitted to the jury.

The learned judge, after stating correctly the extreme care and vigilance which the law exacts of railroad companies, asks if they are required to provide suitable fences and guards to keep cattle off the road. In answering his question in the negative, the judge seems to have misapplied the reasoning of Judge Gibson in Skinner's case, 7 Harris, 298; 1 Am. Law Reg. 97. That was an action by the owner of a cow killed on a railroad, to recover her value from the company; and the doctrine laid down was that the owner was a wrong doer in suffering his cow to wander on a road engaged in transporting passengers, and was rather liable for damages than entitled to recover them. The owner of the cow could not insist that the company should fence their road for the protection of his stock. It was his business to keep his cattle within his own bounds. Now, such reasoning between a railway company and a trespasser commends itself to every man's understanding, because it tends to the security of the passenger. If farmers cannot make companies pay for injuring

cattle, but they involve themselves in liability for suffering their cattle to run at large, passengers are all the more secure from this kind of obstruction.

But when, notwithstanding this strong motive for keeping cattle off the road, a cow is found there, and causes an injury to a passenger whom the company have undertaken to carry safely, is it an answer to the passenger suing for damages that the owner of the cow had no right to let her run at large? Grant that she was unlawfully at large, and grant the owner is bound to indemnify the company for the mischief she caused, yet as between the company and its passenger, liability is to be measured by the terms of their contract.

Having undertaken to carry safely, and holding themselves out to the world as able to do so, they are not to suffer cows to endanger the life of the passenger, any more than a defective rail or axle. Whether they maintain an armed police at cross-roads, as is done by similar companies in Europe; or fence, or place cattle guards within the bed of their road, or by other contrivance, exclude this risk, is for themselves to consider and determine. We do not say they are bound to do the one or the other, but if, by some means, they do not exclude the risk, they are bound to respond in damages when injury accrues.

Perhaps the passenger would have his remedy against the owner of the cow; it is clear, from Skinner's case, that the company would, but the passenger has unquestionably a remedy against the company. If he be injured by reason of defective machinery, nobody would think of setting up the liability of the mechanic who furnished the bad work, as a defence for the company against the claim of the passenger. Yet it would be a defence, exactly analogous to that which satisfied the court in this case. We do not wish to be understood as laying down a general rule, that all railroad companies are bound, independently of legislative enactment, to fence their roads from end to end, but we do insist that they are bound to carry passengers safely, or to compensate them in damages. If a road runs through a farmer's pasture grounds, where his cattle are wont to be, possibly as between the company and the farmer, the latter may be bound to fence, but as between the company and the passenger, the

company are bound to see that the cattle are fenced out. If cattle are accustomed to wander on unenclosed grounds, through which the road runs, the company are bound to take notice of this fact, and either by fencing in their track, or by enforcing the owner's obligation to keep his cattle at home, or by moderating the speed of the train, or in some other manner, to secure the safety of the passenger. That is their paramount duty. To enable them to perform it, the law entitles them to a clear track, 7 Harris, 298; 12 Harris, 496.

Neither cows nor man, not even the servants of the company engaged in the company's work, are permitted to obstruct it. And because their right to a clear track is absolute, their duty to carry safely is imperative. If they tolerate obstructions, they must avoid the danger by reduced speed and increased vigilance, or answer for the consequences.

This doctrine in Skinner's case, designed for the safety of the passenger, was so applied in this case as to compromise it. Herein was manifest error. The case must go back to be tried on the question, whether there was anything in the particular circumstances of the accident to repel the prima facie presumption of negligence.

It is impossible to regard the accident as inevitable. If cattle were in the habit of coming upon the road at that place, or if there was nothing to prevent them, it was a contingency that the company were bound to anticipate and provide against.

The judgment is reversed, and a *venire de novo* awarded.

In the Chesterfield (Va.) Circuit Court—October Term, 1857.

THE RICHMOND AND PETERSBURG RAILROAD COMPANY *vs.* MARTHA J. JONES.[1]

1. A Railway Company, in the prosecution of its lawful business, is entitled to the same protection, and subject to the same responsibilities, as a natural person.
2. The want of skill and caution, in the exercise of its privileges, is the true ground upon which to base any right to recover damages for an injury done to another by a railway company while engaged in its lawful business.

[1] We are indebted to the January number of the Quarterly Law Journal for this case.—*Eds. Am. Law Reg.*